view of the provisions of sub-section (iii) therein I conclude that the real object of the section primarily is to enable the Society to get a complete discharge from its obligations to a deceased member. It does not purport to affect the question of the devolution of the share or interest of the deceased member—a matter still left open as between the nominee and the real beneficiaries of the estate of the deceased.

For these reasons I am of opinion that, in so far as Malay members of a co-operative society are concerned, a nomination does not confer a right on the nominee to take beneficially and the appeal is accordingly dismissed. I make no order as to costs.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

GORDON-SMITH, J.

June 10, 1939.

GOPAL RAJARAM v. PUBLIC PROSECUTOR.

[SELANGOR CRIMINAL APPEAL No. 25 of 1939]

Road Traffic Enactment No. 17 of 1937, S. 25 (i)—negligent driving—accident not prima facie evidence of negligence—burden of proof—Evidence Enactment, S. 106.

In a prosecution for negligent driving under Section 25 (i) of the Road Traffic Enactment, the mere fact that an accident has occurred does not shift the burden on to the accused of proving that such accident was not caused by his own negligence. In that case as in all cases, it is the duty of the prosecution to prove the charge against the accused beyond reasonable doubt. The essence of the charge is not the accident nor any damage flowing from it, but the negligent driving, which is the criminal offence charged.

Where negligence gives rise to both criminal and civil proceedings by an injured party, it does not follow that because there is a civil claim established by a person against another that that other has become criminally responsible in the same matter. A distinction is to be drawn between a negligent act or omission which gives rise to civil liability and one which gives rise to a criminal responsibility. Whereas in a civil case once negligence is proved, the degree of negligence is irrelevant, in a criminal case the degree of negligence is the determining question.

Cases referred to:—

(1) *Andrews v. Director of Public Prosecutions,* 26 Cr. A.R. 34; (1937) A.C. 576.

(2) *Blythe v. Birmingham,* (1856) 11 Excheq. 781.

(3) *Ellor v. Selfridge,* 46 T.L.R. 236.

(4) *Hunter v. Wright,* (1938) 2 All. E.R. 621.

(5) *Rex v. Bateman,* 94 L.J.K.B. 791; 19 Cr. A.R. 8.

(6) *Wilson v. Public Prosecutor,* 8 M.L.J. 129.

MAGISTRATE'S CRIMINAL APPEAL.

H. Y. Teh for the appellant. According to the evidence, the car was being driven at a moderate speed. Before it overturned it had to negotiate a fairly sharp and narrow bend. The surface at the time was very skiddy, the road being tarred and wet due to a drizzle. The accident took place on the near side of the bend but had it been driven fast, it would have overturned on the far side. There was no evidence of any mechanical defect in the car. The cause of the accident was a skid and the car is of a type that overturns easily. He submitted that the mere fact that the car overturned is not sufficient proof that there has been negligence on the part of the driver. In any case, there is a reasonable doubt and the appellant is entitled to the benefit of it. He referred to *Hunter v. Wright,*(4). As to *Wilson v. Public Prosecutor*(6) the facts there were different.

A. J. Grattan-Bellew, Assistant Legal Adviser, for the Public Prosecutor cited *Wilson v. Public Prosecutor*(6) and *Ellor v. Selfridge*(3), and referred to Ss. 106 and 114 of the Evidence Enactment. There being no eye witnesses, the Court was entitled to draw the inference from the position in which the car was found after the accident, that the accused had been negligent, bearing in mind the nature of the road and the fact that there was apparently no other traffic at the time.

Cur. Adv. Vult.

Gordon-Smith, J.—In this case the appellant was charged with contravening Section 25 (i) of the Road Traffic Enactment No. 17/37 in that on the 2nd February last at 11.15 p.m. at the 22nd mile on the main North Road near Rawang, he drove a motor car in a negligent manner.

The appellant had duly reported at the Rawang Police Station an accident which he said was due to his car skidding, resulting in the car being overturned. He was on his way from Penang to Kuala Lumpur.

In consequence of the report, the police visited the scene but the date and time of such visit was not in evidence. There, at the scene, they found a Ford 8 H.P. Saloon, P. 6119 overturned, partly on the road and partly on what had been the grass verge, but road widening had taken place and the grass had not completely regrown. The wheels of the car were in

the air. The road at this point was 17 feet 6 inches in width and there was a bank 7 feet from the edge of the metalled surface of the road, against which the car had apparently bumped. The tyres were in good condition and the surface of the road was level, and between the bank and the road, the ground was muddy in places. At the place where the accident occurred there was a "fairly bad" bend on the road but there were no signs of a skid.

It is significant that the overturned car was on the inner side of the bend, that is on the left of the road coming towards Kuala Lumpur, the bend therefore being from right to left facing in this direction.

This was the only evidence called for the prosecution.

The appellant gave evidence. He said that he was keeping to the left of the road and was doing about 25 miles per hour. It was drizzling at the time (11.15 p.m.) and the road was wet. Coming to the bend, the front wheels began to wobble and the car probably skidded, but he was not certain about this or what was the actual cause of the car leaving the road, but it struck the bank and turned over. The appellant's driver was sitting by him but apparently neither of them were hurt to any extent. The bend was on a slope and the car was climbing at the time of the accident.

On this evidence the appellant was convicted and fined $15/- and his licence endorsed.

In his grounds of judgment the Magistrate stated that he was of the opinion that the car was travelling at an excessive speed as it approached the bend, and thereby got out of control, hit the bank and turned over, and that the fact that the car turned turtle indicated that it must have been travelling at an excessive speed and that therefore there was negligence on the part of the appellant. This, of course, is a matter of inference only from the bare facts of the accident, as there was no evidence at all of the excessive speed.

In my opinion this is a wrong inference to draw from the bare facts. If the driver had been going at such an excessive speed that, whether due to a skid or wheel wobble, the car got out of control, it is inevitable that the car would have been found on the other and outer side of the bend and not on the inner side. The momentum of a car going round a bend at a high speed is, conclusively, forwards and outwards, and although the vagaries of a car in a skid are uncertain, yet the car itself would inevitably tend to run off or overturn on the outer side of the bend. In this case the overturned car was on the inner side of the bend which, irrespective of how the accident actually happened, tends to show that the speed was not high or excessive.

A further point which should not be lost sight of is the fact that the car was a small Ford Saloon, one of those classes of small car which are apt to overturn much more easily than a larger car.

For these reasons the appeal is allowed and the conviction quashed and the fine, if paid, must be returned. The endorsement of the licence is also cancelled.

I reserved judgment in this case solely because of a somewhat similar case in which an appeal was dismissed and the conviction upheld by Mr. Justice Murray-Aynsley, at Ipoh (*Wilson v. Public Prosecutor,*[6] Perak Criminal Appeal 9/39*.) The case has not been reported as yet but is referred to in the Malayan Law Journal for May but I have had the opportunity of persuing a typescript of the judgment. The matter is also of some importance to motorists.

In my view, in the case before me neither the facts, nor the inference to be drawn from the facts, justified either a prosecution by the police or a conviction. It is the duty of a driver, under penalties for not doing so, to report an accident (Section 35 (2)), and which was done in this case. There was no evidence whatsoever except the fact itself of the overturned car, from which it could be assumed or inferred that the appellant was driving negligently. A conviction for driving negligently involves endorsement of the driver's licence and upon a second conviction, the Court is bound to disqualify the driver from holding a licence, except for special reasons to be stated. The consequences therefore of a conviction for negligent driving are serious, apart from the amount of the fine imposed. It was also urged before me in argument that Section 106 of the Evidence Enactment applied and that because an accident had occurred, therefore this section cast upon the accused the burden of proving that such an accident was not caused by his own negligence. This might be so in a civil case but to apply it to a criminal case would be to abrogate the basic principle of criminal law, that it is the duty of the prosecution to prove the charge against an accused. The essence of the charge is not the accident nor any damage flowing from it, but the negligent driving, which is the criminal offence charged. It

*[Since reported in 8 M.L.J. 129—Ed. M.L.J.]

may well be that evidence as to a skid and the surrounding circumstances thereof may lead to a proper inference that it was caused by negligent driving but in the absence of such evidence either as to the skid itself or any surrounding circumstances I do not think that it can be said that, *prima facie*, and by itself, it is sufficient evidence upon which to convict.

"Negligence" has been defined as "doing something which ought either to be done in a different way or not done at all or omitting to do something which ought to be done" (Alderson B. in *Blythe v. Birmingham,*[2]) and a later description by Lord Atkin in *Andrews v. Director of Public Prosecutions,*[1] is "the omission of a duty to take care". It may be that negligence gives rise to both criminal proceedings and civil proceedings by an injured party but it does not necessarily follow that because there is a civil claim established by a person against another that that other has also become criminally responsible in the same matter. There is a distinction to be drawn between a negligent act or omission which gives rise to civil or criminal responsibility. In the latter case the test was laid down in the C.C.A. by the Lord Chief Justice in *Rex v. Bateman*[5] as follows:—

> "In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, the Judges have used many epithets such as 'culpable' 'criminal' 'gross' 'wicked' 'clear' 'complete'. But whatever epithet may be used and whether an epithet be used or not in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment".

It is true that this was a case of manslaughter not caused by negligent driving but it has subsequently been cited and followed as defining what amounts to criminal negligence and it seems to me that the degree of criminal negligence that it is necessary to prove does not depend on whether death results from the negligence or otherwise, as was laid down in the House of Lords in *Andrews v. Director of Public Prosecutions*[1]. In a civil case once negligence is proved, the degree of negligence is irrelevant but in a criminal case the degree of negligence is the determining question.

It seems to me therefore that to apply *dicta* and decisions in civil cases where, whether by reason of a skid or otherwise, injuries have been caused to another through collision with a motor car and damages have been awarded to such other person, is quite inapposite when one has to consider whether or not there has been that degree of negligence which amounts to a criminal offence.

Appeal allowed—conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) & GORDON-SMITH, J.A.

July 11, 1939.

CHEOW KEOK - - Appellant

v.

PUBLIC PROSECUTOR - Respondent.

[SELANGOR CRIMINAL APPEAL No. 1 of 1939]

Penal Code (Cap. 45) Section 304A.

C. K. was convicted by the First Magistrate, Kuala Lumpur, sitting as the Magistrate, Kajang, of an offence against section 304A of the Penal Code arising out of the driving of a motor vehicle and sentenced to three months rigorous imprisonment.

On appeal to the Court of a Judge (Aitken, J.).

Held, that while the evidence disclosed a considerable degree of rashness or negligence—"that I should have no hesitation in substituting a conviction for the offence of dangerous driving **contra** to section 25 of the Road Traffic Enactment, 1937, had I the power to do so"—section 304A of the Penal Code was nothing more than an attempt to codify the offence designated in English law as manslaughter by negligence—that the principles of English common law should be applied to interpret that attempt at codification and that the same high degree of negligence was necessary to support a conviction under the section as was required to support a conviction for manslaughter by negligence in England—the negligence must be so great as to satisfy a jury that the offender had a wicked mind in the sense of being reckless and careless whether death occurred or not. Appeal allowed and conviction set aside.

On Appeal by the Public Prosecutor under section 45A of the Courts Enactment (Cap. 2) to the Court of Appeal.

Held, (Affirming Aitken, J.) that the same high degree of negligence must be proved before a person could properly be convicted of an offence against section 304A Penal Code as would be required to be proved to sustain a conviction for manslaughter by negligence in England and that English authorities should be followed.

Lai Tin v. Public Prosecutor[11] overruled.
Andrews v. Director Public Prosecutions[1] followed.

Cases referred to:—

(1) *Andrews v. Director of Public Prosecutions,* (1937) A.C. 576.

(2) *Attorney General v. Pang Ah Yew,* (1925) A.C. 555; 3 M.L.J. 184.

(3) *Bank of New South Wales v. Piper,* (1897) A.C. 383.